Anne Lim Keng See v The New Staits Times Press (M) Bhd & Anor

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NOS W-02–199 OF 2002, W-02–443 OF 2002 AND W-02–759 OF 2002.
MOHD GHAZALI, TENGKU BAHARUDIN AND JAMES FOONG JJCA
21 MARCH 2008

Civil Procedure — Parties — Striking out of — Whether Malay Mail separate legal entity or newspaper owned and published by first respondent — Whether Malay Mail can be named as party to action

Civil Procedure — Trial — Preliminary issues to be tried — Sole dispute of law — Whether trial suitable for trial of preliminary issue before trial of main action — Whether such procedure can be invoked in defamation suit — Rules of the High Court 1980 O 33 r 2

Tort — Defamation — Defences — Qualified or absolute privilege — Whether notice of substituted service of bankruptcy notice by way of advertisement in Malay Mail protected by privilege — Whether advertisement protected by statutory defence under s 12(1) of the Defamation Act 1951

Tort — Defamation — Libel — Defence of absolute and qualified privilege — Whether publication actuated by malice

Tort — Defamation — Libel — Whether advertisement published by authority of court constituted defamation

On 7 March 1994, MBf Finance Bhd ('MBf') obtained judgment in default against the appellant for the sum of RM8,658.18 together with interest and costs, in the magistrates' court. On 2 November 1999, a bankruptcy notice was issued against the appellant. Then sometime in August 2000, about 10 months after the issuance of the bankruptcy notice, the appellant paid the monies owing by way of a cheque, directly to MBf. However, on 6 September 2000, a few days after the above payment was made MBf as judgment creditor obtained leave to serve the bankruptcy notice and the order for substituted service of the bankruptcy notice by way of advertisement in a

A local newspaper. In the meantime, pursuant to the terms of the court order solicitors for MBf had requested the first respondent, a newspaper publishing company to print the advertisement in the *Malay Mail*, the second respondent, an afternoon daily printed by the first respondent. From the facts it is apparent that the respondents were not aware of what had transpired
B between the appellant and MBf or that the appellant had made a full and final settlement of the judgment sum. The appellant then commenced her suit against the respondents for publishing the advertisement, which she claimed contained words, which were defamatory of her. The appellant who alleged to be a well-known businesswoman claimed that if the words in the
C advertisement were given their natural and ordinary meaning they meant that the appellant, inter alia, was suffering from financial problems, was unable to settle her debts, was facing bankruptcy and was trying to avoid service of the bankruptcy notice. It was therefore the appellant's contention that the said advertisement published by the first respondent was untrue as she was not
D indebted to the judgment creditor and as such the first respondent had committed libel and could not rely upon s 12 of the Defamation Act 1957 ('the Act'). Under the circumstances, the appellant prayed for, inter alia, loss and damages including special damages, aggravated and/or exemplary
E damages for the libel amounting to RM50m. In its defence the first respondent admitted that it is a publishing company and that the second respondent is amongst its publications but contended that the Malay Mail was not in itself a separate legal entity to be sued. Furthermore, the first respondent contended that the words complained of were contained in an
F advertisement published on the authority of the High Court in accordance with law and by reason thereof, the publication was protected by privilege under s 12 of the Act read together with para 3 Part 1 of the Schedule to the Act. As such, the first respondent averred that it was not liable for any damages for libel as pleaded in the statement of claim or at all.

G On 19 September 2001, the appellant obtained judgment in default of appearance against the *Malay Mail* but the first respondent managed to set aside this judgment. When the appellant appealed against the setting aside the first respondent maintained that the *Malay Mail* was not a legal entity registered with either the Registrar of Companies or the Registrar of
H Businesses but was instead one of the many newspaper products produced by the first respondent. The judge hearing the appellant's appeal dismissed the appeal. The appellant appealed against that decision which constituted the first appeal to be heard together with two other appeals. Thereafter, on 26 September 2001, the first respondent filed an application to strike out the
I *Malay Mail* as a party pursuant to O 18 r 19(b), (c) and (d) of the Rules of the High Court 1980 ('the RHC') and under the inherent jurisdiction of the court on the grounds, inter alia, that the *Malay Mail* is not a legal entity but one of the newspapers that the first respondent publish and that there was a very real risk that the appellant would embarrass them by entering judgment

against a non-existent entity. The first respondent's application was allowed and an appeal against this decision was also dismissed. This constituted the second appeal to be heard together with the first appeal. Following this, the first respondent filed an application pursuant to O 33 r 22 of the RHC for an order that the following preliminary issue be tried before the trial of the action, namely whether the first respondent could rely upon the defence of qualified privilege upon the facts of this case. At all times the first respondent maintained that it was the publisher of the *Malay Mail* in which the said advertisement had been published and that the said advertisement was published pursuant to an order of the High Court pursuant to the RHC, the Bankruptcy Act 1967 and the Bankruptcy Rules 1967 ('the Rules').

The judge who heard this application ruled that the first respondent was protected by privilege and consequently ordered that the appellant's action be dismissed with costs. The appellant's appeal against this decision constituted the third appeal. On agreement of all the parties the three appeals, which are inter-related, were heard together. It was the appellant's contention that the defence of qualified privilege was not available to the first respondent because it had failed or neglected to correct or withdraw or apologise in regard to the said advertisement. The appellant also submitted that it had raised malice in its pleadings and that the first respondent could not rely on the defence of qualified privilege if malice was in issue. The first respondent maintained that the case was eminently suitable for disposal pursuant to O 33 r 2 of the RHC because if the first respondent was entitled to rely on s 12(1) of the Act and in the absence of express malice, the court should be able to dispose of the action by way of a determination of a preliminary issue, rather than have the matter proceed to full trial. The first respondent then submitted that s 12(1) of the Act was created specifically to, inter alia, protect a newspaper from libel actions where the newspaper was merely publishing notices or advertisements in accordance with an order of court. The first respondent further submitted that when it pleaded a defence pursuant to s 12 of the Act, the appellant failed to file a reply alleging malice as required under O 78 r 3(3) of the RHC. As such, the appellant was estopped from raising the issue of malice in these proceedings. The issues before the court in respect of all three appeals were namely whether the *Malay Mail* could be named as a party in the action, whether the first respondent was entitled to rely upon the defence of qualified privilege, whether O 33 r 2 of the RHC is an appropriate procedure to be used in defamation suits and whether malice was raised as a response by the appellant to the defence of qualified privilege and if so, whether the question of malice should be tried in a full trial.

Held, dismissing the three appeals with costs:

(1) The *Malay Mail* could not be named as a party in any action because it was not a legal entity. It was not even a name under which the first

respondent was carrying on its business but only a newspaper product, which was owned and published by the first respondent. Moreover, in cases involving libel the persons who can be held liable for the publication of the libel are the author of the libel and the proprietor, editor, printer, publisher and vendor of the newspaper but not the newspaper. Therefore, the first respondent was the person who has the right to be heard in court on any matters affecting or relating to the publication (see paras 26–27).

(2) When MBf applied for leave of extension of time to serve the bankruptcy notice and for an order for substituted service of the bankruptcy notice, it formed part and parcel of judicial proceedings to which there was absolute privilege. In addition, s 12(1) of the Act provides the first respondent with a statutory defence. The publication of the advertisement, which was published on the authority of a court within Malaysia and the Bankruptcy Rules, is absolutely privileged (see paras 51 & 58).

(3) A mere reproduction by the first respondent of a notice of substituted service in the *Malay Mail* upon a payment of a fee or a service charge could not be said to be mala fide. As the objective of the advertisement was to inform the appellant that bankruptcy proceedings had been instituted against her and upon its publication in the *Malay Mail*, the effect in law was that the bankruptcy notice had been duly served upon the appellant as such there was no malice on the part of the first respondent. No evidence was adduced to suggest that the first respondent had ever met the appellant or had any dealings with her prior to the publication of the advertisement. Therefore the first respondent had the absolute right to publish the said advertisement and clearly acted within the law (see para 55).

(4) The instant appeal was clearly a case where the determination of the question posed would substantially dispose of the whole action. The trial of the preliminary issue had resulted in a substantial saving of time and expenditure in respect of the trial of the action as a whole. As such O 33 r 2 is the appropriate procedure to be used in this suit because it dealt with a single point of law, which, after having been decided in favour of the first respondent was decisive, and has disposed of the entire litigation (see para 70).

(5) As the appellant had failed to show any spite or ill-will directed from the first respondent to herself or even any indirect motive she had failed to raise an arguable case that the first respondent was actuated by malice in publishing the advertisement (see para 70).

[Bahasa Malaysia summary

Pada 7 Mac 1994, MBf Finance Bhd ('MBf') telah memperolehi

penghakiman ingkar terhadap perayu untuk sejumlah RM8,658.18 bersama-sama dengan faedah dan kos di mahkamah majistret. Pada 2 November 1999, satu notis kebankrapan telah dikeluarkan terhadap perayu. Kemudiannya, sekitar Ogos 2000, lebih kurang 10 bulan selepas keluarnya notis kebankrapan, perayu telah membayar wang yang terhutang secara cek, terus kepada MBf. Tetapi, pada 6 September 2000, beberapa hari selepas pembayaran tersebut dibuat, MBf sebagai pemiutang penghakiman telah memperolehi kebenaran untuk menyampaikan notis kebankrapan dan perintah untuk penyampaian ganti notis kebankrapan melalui pengiklanan ('iklan') dalam suratkhabar tempatan. Dalam masa yang sama, menurut terma-terma perintah mahkamah, peguamcara MBf telah meminta responden pertama, syarikat penerbitan suratkhabar untuk menyiarkan iklan tersebut di dalam *Malay Mail*, iaitu responden kedua, sebuah harian petang yang dicetak oleh responden pertama. Daripada fakta tersebut adalah jelas bahawa responden-responden tidak menyedari akan apa yang berlaku di antara perayu dan MBf atau bahawa perayu telah membuat penyelesaian penuh dan muktamad jumlah penghakiman tersebut. Perayu kemudiannya memulakan guamannya terhadap responden-resoponden bagi penerbitan iklan tersebut, yang mana beliau mendakwa terkandungnya perkataan yang mana adalah pernyataan fitnah terhadapnya. Perayu yang mendakwa sebagai seorang ahli perniagaan yang terkenal menuntut bahawa jika perkataan-perkataan di dalam iklan tersebut diberikan maksud lazim dan biasa, ianya membawa maksud bahawa perayu, antara lain, sedang menanggung masalah kewangan, tidak dapat untuk menyelesaikan hutang-hutangnya, menghadapi tindakan kebankrapan dan cuba mengelak notis kebankrapan disampaikan kepadanya. Oleh yang demikian, perayu menegaskan bahawa iklan yang diterbitkan oleh responden pertama tersebut tidak benar kerana dia tidak berhutang kepada pemiutang penghakiman dan oleh itu responden pertama telah melakukan libel dan tidak boleh bergantung kepada s 12 Akta Fitnah 1957 ('Akta tersebut'). Di bawah keadaan-keadaan tersebut, perayu memohon antara lain, kerugian dan ganti rugi termasuk ganti rugi khas, ganti rugi teruk dan/atau teladan bagi libel yang berjumlah RM50j. Dalam pembelaannya, responden pertama mengakui bahawa ianya adalah syarikat penerbitan dan responden kedua adalah salah satu daripada penerbitan-penerbitannya tetapi menegaskan bahawa *Malay Mail* bukannya secara sendirinya adalah entiti perundangan yang berlainan untuk didakwa. Selanjutnya, responden pertama menegaskan bahawa perkataan-perkataan yang diadukan yang terdapat di dalam iklan yang disiarkan di atas kuasa Mahkamah Tinggi selaras dengan undang-undang dan berdasarkan alasan tersebut, iklan tersebut adalah dilindungi oleh keistimewaan di bawah s 12 Akta tersebut yang dibaca bersama dengan perenggan 3 Bahagian 1 Jadual, Akta tersebut. Oleh yang demikian, responden pertama menegaskan bahawa ianya tidak bertanggungan bagi mana-mana ganti rugi bagi libel seperti mana yang diplidkan di dalam pernyataan tuntutan atau keseluruhannya.

A Pada 19 September 2001, perayu telah memperolehi penghakiman ingkar terhadap *Malay Mail* tetapi responden pertama dapat mengenepikan penghakiman ini. Apabila perayu perayu terhadap pengenepian responden pertama mengekalkan bahawa *Malay Mail* bukannya satu entiti dalam undang-undang yang berdaftar sama ada dengan Pendaftar Syarikat ataupun
B Pendaftar Perniagaan tetapi hanyalah salah satu daripada produk suratkhabar yang dikeluarkan oleh responden pertama. Hakim yang mendengar rayuan perayu telah menolak rayuan tersebut. Perayu merayu terhadap keputusan tersebut yang membentuk rayuan pertama didengar bersama-sama dengan dua rayuan yang lain. Selanjutnya, pada 26 September 2001, responden
C pertama telah memfailkan permohonan untuk membatalkan *Malay Mail* sebagai pihak menurut A 18 k 19(b), (c) dan (d) Kaedah-Kaedah Mahkamah Tinggi 1980 ('KMT') dan di bawah bidangkuasa sedia ada mahkamah atas alasan, antara lain, *Malay Mail* bukanlah satu entiti dalam undang-undang
D tetapi salah satu daripada suratkhabar yang diterbitkan oleh responden pertama dan terdapatnya risiko yang sebenar bahawa perayu akan memalukan mereka dengan memasukkan penghakiman terhadap entiti yang tidak wujud. Rayuan responden pertama telah dibenarkan dan rayuan terhadap keputusan tersebut juga ditolak. Ini membentuk rayuan kedua
E untuk didengar bersama-sama dengan rayuan pertama. Berlanjutan daripada ini, responden pertama telah memfailkan permohonan menurut A 33 k 22 KMT bagi satu perintah bahawa isu awalan berikut dibicarakan sebelum perbicaraan tindakan tersebut, iaitu sama ada responden pertama boleh bergantung kepada pembelaan perlindungan bersyarat atas fakta kes ini. Pada
F keseluruhan masa yang material, responden pertama mengekalkan bahawa ianya adalah penerbit *Malay Mail* yang mana iklan tersebut telah disiarkan dan iklan tersebut telah disiarkan menurut satu perintah Mahkamah Tinggi menurut KMT, Akta Kebankrapan 1967 dan Peraturan-Peraturan Kebankrapan 1967 ('Peraturan-Peraturan tersebut').

G Hakim yang mendengar permohonan tersebut memutuskan bahawa responden pertama dilindingi oleh keistimewaan dan selanjutnya telah memerintahkan tindakan perayu ditolak dengan kos. Perayu telah merayu terhadap keputusan tersebut dan membentuk rayuan ketiga. Atas persetujuan kesemua pihak, ketiga-tiga rayuan yang mana adalah berkaitan didengar
H bersama-sama. Adalah penghujahan perayu bahawa responden pertama tidak mempunyai pembelaan perlindungan bersyarat kerana ianya telah gagal atau mengabaikan untuk memperbetulkan atau menarik balik atau meminta maaf berkenaan dengan iklan tersebut. Perayu juga menghujahkan bahawa, ianya perlu membangkitkan niat jahat dalam plidingnya dan oleh itu responden
I pertama tidak boleh bergantung kepada pembelaan perlindungan bersyarat jika niat jahat adalah isunya. Responden pertama telah mengekalkan bahawa kes tersebut sangat sesuai diselesaikan menurut A 33 k 2 KMT kerana jika responden pertama berhak untuk bergantung kepada s 12(1) Akta tersebut dan dengan ketiadaan niat jahat yang jelas, mahkamah dapat menyelesaikan

tindakan tersebut dengan cara memutuskan isu awalan, daripada perkara tersebut diteruskan kepada perbicaraan penuh. Responden pertama menghujahkan bahawa s 12(1) Akta tersebut dibuat khas untuk, antara lain, melindungi suratkhabar daripada tindakan libel yang mana suratkhabar hanya menyiarkan notis-notis atau iklan-iklan selaras dengan perintah mahkamah. Responden pertama selanjutnya menghujahkan bahawa apabila ianya memplidkan pembelaan s 12 Akta tersebut, perayu gagal untuk memfailkan balasan yang mendakwa niat jahat adalah diperlukan di bawah A 78 k 3(3) KMT. Oleh itu, perayu adalah diestop daripada membangkitkan isu niat jahat di dalam prosiding ini. Isu-isu di hadapan mahkamah berkenaan dengan ketiga-tiga rayuan adalah, sama ada *Malay Mail* boleh dinamakan sebagai pihak dalam tindakan, sama ada responden pertama adalah berhak untuk bergantung kepada pembelaan perlindungan bersyarat, sama ada A 33 k 2 KMT adalah prosedur yang sesuai untuk digunakan dalam guaman fitnah dan sama ada niat jahat yang telah dibangkitkan oleh perayu kepada pembelaan perlindunagan bersyarat dan jika benar, sama ada persoalan niat jahat seharusnya dibicarakan di dalam perbicaraan penuh.

Diputuskan, menolak ketiga-tiga rayuan dengan kos:

(1) *Malay Mail* tidak boleh dinamakan sebagai pihak di dalam mana-mana tindakan kerana ianya bukanlah satu entiti dalam undang-undang. Ianya juga bukan nama yang dibawa di bawah perniagaan responden pertama tetapi hanya satu produk suratkhabar yang dimiliki dan diterbitkan oleh responden pertama. Tambahan pula, dalam kes-kes yang melibatkan orang yang libel boleh dikatakan bertanggungan terhadap penerbitan libel adalah penulis terhadap libel dan pemilik, editor, pencetak, penerbit dan vendor suratkhabar tetapi bukannya suratkhabar. Oleh itu, responden pertama adalah orang yang sebenar untuk didengar di mahkamah atas mana-mana perkara berkaitan atau berkenaan dengan penerbitan (lihat perenggan 26–27).

(2) Apabila MBf memohon untuk kebenaran lanjutan masa untuk menyampaikan notis kebankrapan dan untuk satu perintah penyampaian ganti notis kebankrapan, ianya membentuk sebahagian prosiding kehakiman yang mana ianya adalah perlindungan mutlak. Sebagai tambahan, s 12(1) Akta tersebut memberikan responden pertama dengan pembelaan statutori. Penerbitan iklan, yang mana disiarkan atas kuasa mahkamah di dalam Malaysia dan Peraturan-Peraturan tersebut adalah secara mutlaknya satu perlindungan (lihat peranggan 51 & 58).

(3) Pengeluaran semula notis penyampaian ganti oleh responden pertama semata-mata di dalam *Malay Mail* selepas membuat bayaran fee atau caj perkhidmatan tidak boleh dikatakan sebagai mala fide. Memandangkan objektif iklan adalah untuk memberitahu perayu bahawa prosiding kebankrapan telah dimulakan terhadap dia dan selepas ianya disiarkan di dalam *Malay Mail*, kesan dari segi undang-undang adalah bahawa notis kebankrapan telah disampaikan kepada perayu, oleh itu tidak terdapat niat jahat pada pihak responden pertama. Tiada bukti dikemukakan untuk mencadangkan bahawa responden pertama pernah bertemu perayu atau mempunyai apa-apa urusan dengan dia sebelum tersiarnya iklan tersebut. Oleh itu, responden pertama mempunyai hak mutlak untuk menyiarkan iklan tersebut dan jelas bertindak dari segi undang-undang (lihat peranggan 55).

(4) Rayuan ini adalah jelas satu kes di mana penentuan soalan yang dikemukakan akan menyelesaikan keseluruhan tindakan. Perbicaraan isu awalan telah menyebabkan penjimatan masa dan perbelanjaan yang besar berkenaan dengan perbicaraan bagi keseluruhan tindakan. Oleh itu, A 33 k 2 adalah prosedur yang sesuai untuk digunakan dalam guaman ini kerana ianya berurusan dengan isu perundangan, yang mana selepas diputuskan berpihak kepada responden pertama adalah muktamad, dan telah menyelesaikan keseluruhan litigasi (lihat perenggan 70).

(5) Oleh kerana perayu telah gagal untuk menunjukkan apa-apa kejahatan atau niat jahat yang ditujukan daripada responden pertama kepada dirinya ataupun mana-mana motif tidak langsung beliau telah gagal untuk membangkitkan satu kes yang dipertikaikan bahawa responden pertama telah bertindak secara niat jahat dalam menyiarkan iklan tersebut (lihat perenggan 70).]

Notes

For cases on defences to defamation, see 12 *Mallal's Digest* (4th Ed, 2005 Reissue) paras 308–319.

For cases on libel, see 12 *Mallal's Digest* (4th Ed, 2005 Reissue) paras 369–527.

For cases on preliminary issues to be tried, see 2(3) *Mallal's Digest* (4th Ed, 2007 Reissue) paras 7862–7867.

For cases on striking out of parties, see 2(2) *Mallal's Digest* (4th Ed, 2007 Reissue) paras 5149–5153.

Cases referred to

Allen v Gulf Oil Refining Ltd [1981] 1 All ER 353 (refd)
Beach v Freeson [1972] 1 QB 14 (refd)
Carl Zeiss Stiftung v Herbert Smith & Co [1969] 1 Ch 93 (refd)
Everett v Ribbands [1952] 1 KB 112 (refd)

Federal Insurance Co v Nakano Singapore (Pte) Ltd [1992] 1 SLR 390 (refd)
Keays v Murdoch Magazines (UK) Ltd & Anor [1991] 4 All ER 491 (refd)
Lazard Brothers & Co v Banque Industrielle De Moscou [1932] 1 KB 617 (refd)
Morris & Anor v Sandess Universal Products [1954] 1 All ER 47 (refd)
Royal Aquarium and Summer and Winter Garden Society Ltd v Parkinson [1892] 1 QB 431 (refd)
Searles v Scarlett [1892] 2 QB 56 (refd)
Tilling v Whiteman [1979] 1 All ER 401 (refd)

Legislation referred to

Bankruptcy Act 1967
Bankruptcy Rules 1969 rr 91(1), 92, 94, 97, 109, 110
Defamation Act 1957 ss 2, 12, 12(1)
Interpretation Acts 1948 and 1967 s 3
Rent Act 1957 [UK] ss 2, 12, 12(1)
Rules of the High Court 1980 O 18 r 19(b), O18 r 19(c), O18 r 19(d), O 33 r 2, O 78 r 3(3)
Supreme Court Practice [UK] O 82 r 3(3)

Appeal from: Civil No S6–23–48 of 2001 (High Court, Kuala Lumpur)

Arunachalam Ramiah (Norhafiza Izura bte Ab Llah with him) (Arun & Co) for the appellant.
Lorraine Cheah (Shearn Delamore & Co) for the respondents.

Mohd Ghazali JCA (delivering judgment of the court):

[1] These three appeals arose from the same suit. At the request of the parties, Civil Appeal No W-02–199 of 2002 and Civil Appeal No W-02–759 of 2002 were heard together (hereafter referred to as the first and second appeals, respectively). Civil Appeal No W-02–443 of 2002 was heard separately (hereafter referred to as the third appeal).

THE SUIT

[2] On 28 May 2001, the appellant (the plaintiff in the court below) filed this action against the first respondent (the first defendant in the court below), a newspaper publishing company following an advertisement of a notice of substituted service of a bankruptcy notice directed against the appellant (hereafter referred to as 'the said advertisement') which appeared in the 22 January 2001 issue of 'the Malay Mail', ie, the second respondent (the second defendant in the court below and hereafter referred to as 'the Malay Mail'), an afternoon daily printed by the first respondent.

A **[3]** The appellant claims that she is a well-known businesswoman who owns a registered business enterprise known as Golden Kintex and is also a director of several locally incorporated companies. She also claims that she is a well-known writer and a 'Goodwill Ambassador' of an association known as Persatuan Kebajikan Haiwan.

B

[4] It is her contention that the said advertisement contained words which are defamatory of her. The said advertisement reads:

C

DALAM MAHKAMAH TINGGI MALAYA DI KUALA LUMPUR

(BAHAGIAN DAGANG)

DALAM PERKARA KEBANKRAPAN NO: D2-29-4162 TAHUN 1999

D

Berkenaan: Anne Lim Keng See

(No. K/P: A 0149182) ... Penghutang Penghakiman

Ex-Parte: MBF Finance Berhad ... Pemiutang Penghakiman

E

NOTIS PENYAMPAIAN GANTI

Kepada:

F

Anne Lim Keng See

11, Jalan 13/46,

Bandar Tasik Selatan,

57000 Kuala Lumpur.

G AMBIL PERHATIAN bahawa suatu tindakan telah dimulakan terhadap kamu di Mahkamah Tinggi Kebankrapan D2–29–4162 Tahun 1999 oleh MBF Finance Berhad yang beralamat di Tingkat 2, Wisma MBF, Jalan Pudu, 55100 Kuala Lumpur dan Mahkamah Yang Mulia ini telah memerintahkan bahawa notis kebankrapan ini diserahkan kepada kamu secara penyampaian ganti dengan menampalkan sesalinan perintah dan sesalinan notis kebankrapan di papan notis Mahkamah Tinggi Kuala Lumpur, di alamat terakhir Penghutang Penghakiman di 11, Jalan 13/46, Bandar Tasik Selatan, 57000 Kuala Lumpur serta melalui bentuk iklan dalam suratkhabar tempatan dan penyampainan tersebut adalah sempurna dan cukup terhadap penghutang penghakiman selepas (7) hari dari tarikh penyampaian dan pengiklanan.

H

I

Notis Kebankrapan ini boleh diperiksa oleh kamu di atas permohonan di Mahkamah Tinggi Kuala Lumpur.

Bertarikh pada 6hb September, 2000

Penolong Kanan Pendaftar,

Mahkamah Tinggi,

Kuala Lumpur

Notis Penyampaian Ganti ini difailkan oleh Tetuan TK Ooi, Loo & Partners yang beralamat di Blok A, Tingkat 10, Wisma Yakin, Jalan Masjid India, 50100 Kuala Lumpur, peguamcara bagi Pemiutang Penghakiman.

(Ruj Kami: MBF-PU/LOC/24-93).

The appellant avers that the said advertisement clearly referred to her. She claims that in their natural and ordinary meaning, the words meant and were understood to mean as follows:

(a) that she is unable to settle her debts;

(b) that she is facing financial problems;

(c) that she is not credit-worthy;

(d) that others who have business dealings with her should terminate such dealings;

(e) that she suffers from financial problems and is facing bankruptcy and is unable to settle her debts to creditors;

(f) that financial institutions and other institutions be put on alert as to take immediate steps before she is declared a bankrupt;

(g) that she may at anytime be adjudicated bankrupt and all her assets may be seized and be placed under the official assignee; and

(h) that she has failed to settle her debts and is trying to avoid service of the bankruptcy notice.

The appellant further claims that the said advertisement is not true and is false and by reason of the said advertisement, she has been gravely injured in her character and reputation, suffered catastrophic distress and embarrassment and has been brought into public scandal, odium and contempt and is injured in her character, credit and reputation and has suffered damages and/or special damages the particulars of which are as follows:

(a) that she and her husband and family have been taunted, insulted and had suffered anxiety and depression which has caused her additional hurt, anxiety, loss of business and profits and embarrassment; and

(b) that she also had 'to confront added insult and hurdle' as her bank account has been frozen or legally blocked which crippled the free usage of her funds kept in the banks and financial institutions thus disabling her from financing her business contracts and commitments as a result

of which the contracts were terminated which brought huge loss and damage in the amount of RM5,000,000.

[6] In the alternative, she prays for aggravated and/or exemplary damages as per, inter alia, the following particulars:

(a) the said advertisement was published in a newspaper which has wide readership throughout the country and was published to attract the attention of the public;

(b) she has contacted the respondents and informed them that the said advertisement was not true and false and requested that the same be withdrawn but the respondents did not take any action;

(c) the publication of the said advertisement clearly injured her reputation;

(d) in any event the respondents did not contact her before the said advertisement was published or any other party who directed the respondents to advertise the libel, to ensure the truth of the contents of the said advertisement; the respondents also know that this is the usual practice adopted by responsible news printers; however, the respondents acted intentionally and mala fide when they advertised the libel as their only interest is to make profit out of the said advertisement; and

(e) her solicitors have informed the respondents that the said advertisement is not true and false but the respondents did not tender any apology nor took any action to withdraw the said advertisement.

[7] Under the circumstances, the appellant prays for the following reliefs:

(a) loss and damages including special damages, aggravated and/or exemplary damages for the libel amounting to RM50,000,000;

(b) interest from 22 January 2001 until the date of full realisation;

(c) costs; and

(d) any other relief as deemed appropriate by the court.

THE DEFENCE

[8] The first respondent admits that it is a publishing company and that amongst its publication is the *Malay Mail* but contends that the *Malay Mail* is not itself a separate legal and/or corporate entity and as such denies that the name *Malay Mail* can be sued and hence reserve its rights to apply for the name *Malay Mail* to be struck out from these proceedings.

[9] The first respondent further admits that the 22 January 2001 issue of the *Malay Mail* contained the said advertisement but denied that the words in the said advertisement referred to or were understood to refer to or were capable of referring to the appellant. Further, if which is denied, the said words referred to or were understood to refer to the appellant, it is denied that they bore, or were understood to bear or were capable of bearing the meanings pleaded in the statement of claim or any meaning defamatory of the appellant.

[10] Further or alternatively, the first respondent contends that the words complained of were contained in an advertisement published on the authority of the High Court, Kuala Lumpur in accordance with law and by reason thereof, the publication is protected by privilege under s 12 of the Defamation Act 1957 ('the Act') read together with para 3 of Part I of the Schedule to the Act referred thereto. In relation to this the first respondent pleaded the following particulars:

(a) on or about 18 January 2001, the first respondent received a written request by a firm of solicitors, Messrs TK Ooi, Loo & Partners to publish the order for substituted service of the bankruptcy notice on one Anne Lim Keng See, viz, the appellant;

(b) the written request was accompanied by a copy of the order for substituted service which bore the seal of the High Court, Kuala Lumpur;

(c) by the said order made on 6 September 2000, the bankruptcy notice against the appellant was to be served by way of an advertisement in a local newspaper and that was deemed to be good and sufficient service;

(d) the first respondent will refer to and rely on the order made on 6 September 2000 for its full term and effect at the trial;

(e) in the premises, the publication is privileged by virtue of s 12 of the Act read together with para 3 of Part I of the Schedule to the Act.

[11] By reason of the matters aforesaid, the first respondent avers that it is and was not liable for any damages for libel as pleaded in the statement of claim or at all.

[12] The first respondent denies that the appellant suffered injuries to her character and/or reputation or was or has been at any time brought into public scandal, odium and contempt or at all. It was further denied that the publication of the said advertisement was mala fide or with malice, as alleged or at all. The first respondent contends it published the said advertisement in the usual course of business and honestly believing it to be a notice required to be published on the authority of the High Court. In any event, the first

respondent avers that by virtue of the status of the statement and being an order of court, it honestly and in good faith believed that it was proper to publish it and denies that the motive for publication was to make profit.

THE FIRST APPEAL

[13] On 19 September 2001, the appellant obtained judgment in default of appearance against the *Malay Mail*. The first respondent consequently applied to set aside the said judgment and the application was allowed by the learned deputy registrar. The appellant appealed against that decision to the judge in chambers. The learned judge was of the view that the learned deputy registrar arrived at the correct decision and on 21 February 2002 dismissed the appeal.

[14] In his grounds of judgment the learned judge said:

> It was contended by counsel for the first defendant that the second defendant was not a legal entity registered with either the Registrar of Companies or the Registrar of Businesses. The *Malay Mail* was one of the many newspaper products produced by the first defendant. In the circumstances of this case I concluded that the second defendant is not a legal entity.
>
> In cases of defamation, involving defamation by a newspaper the parties responsible or answerable for the matters that have been published in the newspaper are the author, proprietor, editor, printer, publisher and vendor of the newspaper concerned but not the newspaper itself. This position is clearly stated in *Halsbury's Laws of England* (4th Ed) at p 19 (para 38):
>
> > 38. JOINT AND SEVERAL LIABILITY
> >
> > Every person who takes part in or procures the publication of a libel is prima facie liable jointly and severally for all damages caused by it. Thus, if a libel appears in a newspaper, the author of the libel and the proprietor, editor, printer, publisher and vendor of the newspaper are prima facie jointly and severally liable.
>
> And at p 1531, para 81/1/7 of the Supreme Court Practice, it is stated:
>
> > The name of a newspaper is not usually a name under which the proprietors carry on the business and they should not be sued.
>
> Because the second defendant, the *Malay Mail*, is not a legal entity it should not have been sued as a party. As such the order made against it should be set aside *ex debito justictiae*. In para 13/9/6 O 13 of the Supreme Court Practice 1999 Vol 1 it is stated:
>
> > JUDGMENT SET ASIDE BY THE COURT OF ITS OWN MOTION — If it comes to the knowledge of the court that it has entered judgment in default of acknowledgment of service against a man who at the material time was dead

or a company which at such time was dissolved or non-existent according to the law of its country or origin the court is bound after hearing the parties interested, of its own motion to set the judgment aside. Such judgment is null and void.

In my view, the second defendant, the *Malay Mail*, comes with such category of non-existent entity. As such the judgment entered against the second defendant earlier was null and void. On this matter I need only to refer to the Supreme Court case of *Syarikat Joo Seng & Anor v Habib Bank Ltd* [1986] 2 MLJ 129. In this case the respondent had brought a writ action against the appellants. The appellants entered a conditional appearance and applied to strike off the writ and the statement of claim. The application was dismissed on 4 June 1984 and notice of appeal was filed on 29 June 1984. However on 22 June 1984 the respondent without obtaining leave of the court entered a judgment in default of defence against the appellants. The appellants applied to set aside the default judgment and this was refused by the High Court. The appellants appealed to the Supreme Court. In allowing the appeal the Supreme Court ruled:

> In this case the respondents should have complied with O 19 r 7(1) of the Rules of the High Court by applying to the court or a judge for leave to enter judgment against the appellants. This they failed to do and therefore the judgment was an irregular judgment obtained in direct contravention of O 19 r 7(1). The appellants are therefore entitled *ex-debito justitiae* to have the default judgment set aside.

In the instant case, counsel for the plaintiff contended that the first defendant who made this application to set aside the judgment in default had no locus standi to bring this application. The plaintiff argued that since the default judgment was made against the second defendant the application to set it aside should be made by the second defendant.

In my view there were no merits in the plaintiff's contention. The second defendant is not a legal entity. It cannot be sued and therefore has no capacity to sue. As such the second defendant does not have the legal capacity to bring any action in court including the application to set aside the default order. Since the first defendant is the owner of the second defendant, it has the power to bring any action concerning itself as well as its own assets, including the second defendant. In the light of the relationship between the first defendant and the second defendant and having regard to the legal capacity of the second defendant it was quite clear to me that any action concerning the second defendant should be brought by the first defendant and not the second defendant. Therefore the first defendant has the locus standi to make this application.

In the light of the reasons as I have stated above I arrived at the decision that the plaintiff's appeal against the decision of the learned deputy registrar be dismissed with costs.

THE SECOND APPEAL

[15] On 26 September 2001 the first respondent filed an application to

strike out the *Malay Mail* as a party pursuant to O 18 r 19(b), (c) and (d) of the Rules of the High Court 1980 ('the Rules') and under the inherent jurisdiction of the court on the following grounds:

(a) that the *Malay Mail* is not a legal entity; it is the name of one of the newspapers that the first respondent publish;

(b) that the appellant has been informed of this and was invited to withdraw her claim against the *Malay Mail* but refused;

(c) that the appellant has asked the first respondent to enter appearance on behalf of the *Malay Mail* and threatened to enter judgment in default if this is not done; and

(d) that the first respondent now face the very real risk that the appellant will embarrass them by entering judgment against the *Malay Mail* which is a non-existent entity and publicise this to their detriment.

[16] The learned deputy registrar allowed the application and struck out the *Malay Mail* as a party. The appellant appealed to the judge in chambers. On 28 August 2002 the learned judge dismissed the appeal.

THE THIRD APPEAL

[17] Meanwhile on 30 October 2001 the first respondent filed an application made pursuant to O 33 r 2 of the Rules praying for an order that the following preliminary issue be tried before the trial of this action, namely, whether the first respondent is entitled to rely upon the defence of qualified privilege under s 12 of the Act premised upon the following facts:

(a) the first respondent is the publisher of the *Malay Mail*;

(b) that the said advertisement has been published in the *Malay Mail*; and

(c) that the said advertisement was published pursuant to an order of the High Court of Malaya pursuant to the Rules, the Bankruptcy Act 1967 and the Bankruptcy Rules 1967.

[18] The first respondent provided the following reasons for the application, namely:

(i) that it is the publisher of the *Malay Mail* and is entitled to rely on the defence of qualified privilege under s 12 of the Act;

(ii) that the appellant did not file any reply to the statement of defence filed by the first respondent;

(iii) in the eventuality this application is allowed, the whole action can be disposed without the necessity of undergoing a full trial.

[19] This application by the first respondent made pursuant to O 33 r 2 of the Rules was strenuously objected to by the appellant. The learned judge then ordered counsel for the parties to furnish written submissions and on 23 May 2002 ruled that the first respondent is protected by s 12 of the Act and consequently ordered that the appellant's action be dismissed with costs.

[20] Before the learned judge, counsel for the first respondent pointed out that the first respondent received a request from Messrs TK Ooi, Loo & Partners, solicitors for MBf Finance Berhad, ie, the judgment creditor, to publish the said advertisement through a newspaper as ordered by the High Court and as such should not be liable to the appellant for defamation for the publication since such act falls squarely within the ambit of s 12 of the Act read with para 3 of Part I of the Schedule to the Act. Counsel also stressed that the first defendant had no malice in publishing the said advertisement. Counsel referred to s 12 of the Act, para 3 of Part I of the Schedule to the Act and s 2 of the Act on the meaning of the word 'newspaper' to support his contention. Counsel then submitted that if the court makes a finding that the first respondent is indeed entitled to rely upon s 12 of the Act read together with para 3 of Part 1 of the Schedule to the Act, the entire suit can be disposed of at this stage without the need for the matter to proceed to trial.

[21] Section 12 of the Act (the side-note reads 'qualified privilege of newspapers') provides as follows:

> (1) Subject to the provisions of this section, the publication in a newspaper of any such report or other matter as is mentioned in Part I of the Schedule to this Act shall be privileged unless the publication is proved to be made with malice.

Paragraph 3 of Part I of the Schedule to the Act reads:

> (3) A notice, advertisement or report issued or published by or on authority of any court within Malaysia or any Judge or officer of such court or by any public officer or receiver or trustee acting in accordance with the requirements of any written law.

As to the meaning of the word 'newspaper', s 2 of the Act reads:

> 'newspaper' means any paper containing public news or observations thereon or consisting wholly or mainly of advertisements which is printed for sale and is published in Malaysia either periodically or in parts or numbers at intervals not exceeding thirty-six days.

[22] In opposing the application the appellant contended that the said advertisement published by the first respondent was untrue as she was not indebted to the judgment creditor and as such the first respondent has committed libel and could not rely upon s 12 of the Act as a defence.

[23] The learned judge allowed the first respondent's application and consequently dismissed the appellant's suit with costs. In his grounds of judgment, the learned judge said:

> I was unable to agree with the plaintiff's argument. For purpose of a defence under s 12 of the Defamation Act, all that the first defendant needed to prove was that there was actually an order of the court asking such advertisement to be published in the newspaper. This had not been disputed. The non-truthfulness of the plaintiff's debt to the judgment creditor would be a matter for the plaintiff to state at the Bankruptcy Court as a ground to set aside the bankruptcy notice or order. The only ground that the first defendant would not be allowed to invoke s 12 as a defence is if the publication was done with malice. On the facts of this case there was no evidence of malice whatsoever by the first defendant in advertising the publication. It genuinely had no knowledge that the plaintiff's indebtedness to the judgment creditor was untrue.
>
> After having considered the whole circumstances this case including the submissions by counsel from both parties I decided to allow the first defendant's application. As a matter of fact the first defendant's application was very much in conformity with the spirit of newly included O 14A of the High Court Rules 1980 which authorises the court to dispose off summarily appropriate cases based on affidavit evidence instead of going through lengthy hearing by calling witnesses.
>
> Having regard to the whole circumstances of this case I was fully satisfied that this case could be disposed of by first determining the preliminary legal issue as raised by the first defendant in this application. And I was also satisfied that the first defendant was entitled to rely upon the defence of qualified privilege by virtue of s 12 of the Defamation Act 1957. I therefore allowed the first defendant's application with costs.

JUDGMENT OF THIS COURT IN RELATION TO THE FIRST AND SECOND APPEALS

[24] As discussed earlier, all parties agreed that the first and second appeals be heard together as they are inter-related. After hearing the parties, we unanimously dismissed the first and second appeals with costs and ordered that the deposits be remitted to the first respondent to the account of taxed costs.

[25] We agree with the learned judge that the *Malay Mail* is not a legal entity. It is but a newspaper product which is owned and published by the first respondent and the name *Malay Mail* is not the name under which the

first respondent carry on its business. As such the *Malay Mail* cannot be named as a party in any action. We would also agree with the learned judge that in cases involving libel, the persons who can be held liable for the publication of the libel in a newspaper are the author of the libel and the proprietor, editor, printer, publisher and vendor of the newspaper but not the newspaper.

[26] Thus, we are of the view that the judgment in default obtained against the *Malay Mail* is a nullity. The *Malay Mail* is not a legal entity on the date the writ was issued and is not even a name under which the first respondent is carrying on its business. As such the learned judge was clearly entitled to set aside the judgment in default obtained against the *Malay Mail* and consequently striking it out as a party.

[27] A case on point is *Lazard Brothers & Co v Banque Industrielle De Moscou* [1932] 1 KB 617. In that case the court held that if it comes to the knowledge of the court that it has entered judgment in default of appearance against a man who was at the time dead, or a company which was at the time dissolved, or non-existent according to the law of its country of origin, the court is bound, after hearing the parties interested, of its own motion to set the judgment aside.

[28] The facts of *Lazard Brothers* are as follows. An English firm commenced an action in 1930 against the Banque Industrielle De Moscou ('BIM') which was domiciled in Russia. The writ was served, after obtaining leave from the court, by posting it by registered letter to BIM's head office in Moscow. No appearance having been entered, judgment was signed against BIM. Subsequently a letter was received from the London Embassy of the Soviet Republic stating that the notice of the writ could not be delivered as BIM went out of existence in 1917. Meanwhile, having obtained judgment by default, the plaintiffs obtained a garnishee order nisi against the Midland Bank, an English bank attaching money alleged to be due from that bank to BIM and that order was subsequently made absolute. The Midland Bank appealed. On appeal, the judgment by default on which the garnishee order nisi was founded was set aside and the order of the court making the garnishee order absolute was also set aside. In his judgment Scrutton LJ said (at p 624):

> One of the vital points in this case is whether there was, in October or November, 1930, any existing juristic person known as the Banque Industrielle de Moscou or the Russian equivalent of that name, on whom a writ or notice of a writ could be served, or against whom judgment in default of appearance could be given. I am aware that in *Jacques v Harrison* (1884) 12 QBD 165 the Court of Appeal has decided that if a person injuriously affected by a judgment by default and not a party to that action desires to set aside the judgment, he must apply either in the

defendant's name, if he is entitled to use it, or in his own name, by a summons served both on the plaintiff and the defendant, to have it set aside. But I am aware of no case, and counsel could not refer me to one, when this has been applied to the case of a non-existent person, or defendant, on whom no summons can be served. Indeed, in my opinion, if it comes to the knowledge of the court that it has entered judgment in default of appearance against a man who was at the time dead, or a company which was at the time dissolved, or non-existent according to the law of its country of origin, the court is bound, after hearing the parties interested, of its own motion to set the judgment aside. Such a judgment is null and void: see *Simmons v Liberal Opinion* [1911] 1 KB 966 (non-existent company); *Tetlow v Orela* [1920] 2 Ch 24 (plaintiff dead at time of writ); also the observations of Lord Parker in *Daimler Co v Continental Tyre and Rubber Co (Great Britain)* [1916] AC 307, at p 337), referred to by Viscount Cave in *Russian Commercial and Industrial Bank v Comptoir d'Escompte de Mulhouse* [1925] AC 112, at p 130: 'But when the court in the course of an action becomes aware that the plaintiff is incapable of giving any retainer at all, it ought not to allow the action to proceed.'

[29] In the instant appeal, counsel for the appellant argued that a newspaper is a 'person' and to support this contention referred to s 3 of the Interpretation Acts 1948 and 1967 (Act 388) which provides that the word 'person' includes a body of persons, corporate or unincorporate. He further argued that the first respondent does not have the locus standi to step into the shoes of the *Malay Mail* and hence would not be in a position to apply to set aside the judgment in default. We do not think that this line of argument is correct. We are of the view that the *Malay Mail* would not fall within the contemplation of the word 'person' as provided for in s 3 of the Interpretation Acts 1948 and 1967. A name attached to a publication is similar to a brand name of a product and the product by itself is not a legal entity or even an artificial person like a company incorporated under company law. The *Malay Mail* is clearly not a 'person' as such.

[30] We are also of the view that the first respondent has the locus standi and is the correct party to make the application to set aside the judgment in default obtained against the *Malay Mail*. The first respondent is the owner and publisher of the *Malay Mail* and is the person in law capable of making the application, the *Malay Mail* not being a legal entity. The *Malay Mail* is a publication of the first respondent and hence the first respondent is the person who has the right to be heard in court on any matters affecting or relating to the publication.

[31] For the reasons above, we dismissed the first and second appeal with costs and ordered that the deposits be remitted to the first respondent to the account of taxed costs.

JUDGMENT OF THE COURT IN RELATION TO THE THIRD APPEAL

[32] With regards to the third appeal, we had after hearing the parties reserved out judgment. We now give our decision.

[33] As discussed earlier, this appeal is with regards to the application made by the first respondent pursuant to O 33 r 2 of the Rules. Order 33 (mode of trial) reads:

(1) ...

(2) The Court may order any question or issue arising in a cause or matter, whether of fact or law or partly of fact and partly of law, and whether raised by the pleadings or otherwise, to be tried before, at or after the trial of the cause or matter, and may give directions as to the manner in which the question or issue shall be stated.

(3) ...

(4) ...

(5) If it appears to the Court that the decision of any question or issue arising in a cause or matter and tried separately from the cause or matter substantially disposes of the cause or matter or renders the trial of the cause or matter unnecessary, it may dismiss the cause or matter or make such other order or give such judgment therein as may be just.

[34] The question posed by the first respondent by way of a preliminary point is whether it is entitled to rely upon the defence of qualified privilege pursuant to s 12 of the Act as it is the publisher of the *Malay Mail* and had published the said advertisement pursuant to an order of the court. The learned judge decided that the first respondent is entitled to rely upon such a defence and consequently ruled that the entire suit is disposed of without the need for the matter to proceed to trial.

[35] We requested counsel to submit on 2 issues, namely:

(i) whether O 33 r 2 of the Rules is an appropriate procedure to be used in defamation suits; and

(ii) whether malice is an issue that has been raised by the appellant as a response to the defence of qualified privilege under s 12(1) of the Act raised by the first respondent and if so, whether the question of malice should be tried in a full trial.

THE APPELLANT'S SUBMISSION

[36] Counsel for the appellant pointed out that on the issue of malice, the learned judge said as follows:

> The only ground that the first defendant would not be allowed to invoke s 12 as a defence is if the publication was done with malice. On the facts of this case, there was no evidence of malice whatsoever by the first defendant in advertising the publication.

Counsel argued that there was in fact malice. He then referred to the following facts, namely:

(a) the appellant had already advanced a notice to the first respondent that the bankruptcy notice was not true;

(b) the first respondent did not bother to correct the said advertisement or withdraw the notice; and

(c) the first respondent did not forward any apology.

[37] Counsel then referred to several authorities relating to O 33 r 2 of the Rules, some of which we will later refer to, and argued that applications made under this rule is not a suitable method to dispose of a defamation suit by way of determining a preliminary issue.

[38] Counsel pointed out that under s 12(1) of the Act, the first respondent cannot rely on the defence of qualified privilege if malice is in issue. He explained that the section itself has made an exception in regard to the issue of malice and pointed out that in the instant appeal, the issue of malice was raised in the pleadings and the first respondent has denied there was malice. As such, the learned judge erred when he overlooked the statutory exception and proceeded to consider the application in the first respondent's favour. Further, the defence of qualified privilege is also not available because the first respondent failed or neglected to correct or withdraw or apologise in regard to the said advertisement.

[39] Counsel's arguments in canvassing the appeal can be summarised as follows:

(i) this is not a case where O 33 r 2 of the Rules can be invoked;

(ii) the issues are complex and thus the matter should go for full trial;

(iii) the issue of malice is at large to be established by viva voce evidence in trial;

(iv) s 12 of the Act cannot be invoked as defence when malice is raised; A

(v) an issue which involves clearly with the whole subject matter of the action without any evidence is not a preliminary point and should not be ordered to be tried as such.

B

THE FIRST RESPONDENT'S SUBMISSION

[40] After referring to several authorities, some of which we will later refer to, counsel for the first respondent argued that the circumstances in the instant appeal is one of the situations in which the procedure under O 33 r 2 C of the Rules is eminently suitable for disposal of the entire cause of action as it deals with a single point of law which, if decided in favour of the first respondent, will be decisive and can dispose of the entire litigation. He then referred to s 12(1) of the Act and pointed out that the section provides a statutory defence for the first respondent and is an absolute defence to this D action and that all the first respondent would therefore have to establish are the following:

(a) that the 'Malay Mail' is a newspaper;

(b) that the publication is an advertisement issued on the authority of a E Malaysian court is in accordance with the requirements of written law; and

(c) that there is no issue of malice before the court and that the appellant has not raised the issue of malice.

F

[41] Counsel stressed that the publication of the said advertisement was pursuant to an order for substituted service made by the Kuala Lumpur High Court. He pointed out that the appellant has not raised the issue of malice in the statement of claim and there is no reply filed by the appellant to the G first respondent's defence; as such, there is no issue of malice before the court. In support, counsel referred to O 78 r 3(3) of the Rules which he submitted is in pari materia with O 82 r 3(3) of the English Supreme Court Practice and for support referred to the commentary in *The Supreme Court Practice — Malaysia Edition* (1996 Reprint of 1979 Ed) Vol 1, at p 1297 which reads as H follows:

> But if there is a lawful excuse for the publication (as for example, where it is an occasion of qualified privilege) by which the inference of law is prima facie rebutted, the onus is thrown upon the plaintiff of proving the existence as a fact I of the malice necessary to maintain the action.

[42] Counsel then submitted that therefore the onus and burden is on a plaintiff to plead malice in a reply if the plaintiff wishes to rebut a lawful

defence. In the instant appeal, the first respondent has pleaded a defence pursuant to s 12 of the Act and the appellant failed to file a reply alleging malice as required under O 78 r 3(3) of the Rules. The appellant is therefore estopped from raising the issue of malice in these proceedings and, as there is no issue of malice before the court, there is no necessity for the court to consider whether malice can be proved.

[43] In conclusion, counsel submitted that this is one of the occasions when the facts and issue are eminently suitable for disposal pursuant to O 33 r 2 of the Rules. He argued that s 12(1) of the Act was created specifically to, inter alia, protect a newspaper from libel actions where the newspaper was merely publishing notices or advertisements in accordance with an order of court and that once the court finds that a defendant is entitled to rely on s 12(1) of the Act and in the absence of express malice, the court should be able to dispose of the action by way of a determination of a preliminary issue, rather than have the matter proceed to full trial which would lead to delay and additional costs.

[44] The background facts leading to this suit as digested from the appeal record are as follows:

(a) on 7 March 1994, MBf Finance Berhad obtained judgment in default against the appellant in the magistrate court, Kuala Lumpur for the sum of RM8,658.18 with interest at 22% per annum from 28 October 1993 until date of realisation and the sum of RM450 as costs;

(b) on 2 November 1999, a bankruptcy notice was issued against the appellant;

(c) by letter dated 31 August 2000 MBf Finance Berhad wrote to the appellant acknowledging receipt of payment by cheque for the amount of RM9,500 as full and final settlement of a credit card debt and stated therein that 'we will proceed to close your file accordingly (upon cheque clearance)';

(d) on 6 September 2000, solicitors for MBf Finance Berhad as judgment creditor obtained leave for extension of time to serve the bankruptcy notice and for an order for substituted service of the bankruptcy notice to be effected by affixing a copy on the notice board of the High Court and at the last known address of the appellant at No 11, Jalan 13/46, Bandar Tasik Selatan, 57000 Kuala Lumpur and by way of advertisement in a local newspaper; the order and the notice of substituted service was signed by the senior assistant registrar on 6 September 2000, ie, on the same date when leave and the order was granted;

(e) by letter dated 18 January 2001 solicitors for MBf Finance Berhad, Messrs TK Ooi, Loo & Partners wrote to the first respondent as follows:

> We act for MBf Finance Berhad.
>
> We have been instructed by our client to request you to publish at (sic) the 'MALAY MAIL' the enclosed notice in one (1) issue for one (1) day only that is 22 January 2001.
>
> Please let us have a copy of the paper in which the publication appears immediately upon publication.;

(f) the said advertisement appeared in the 22 January 2001 issue of the *Malay Mail*;

(g) consequently, the appellant instructed her solicitors to give a written notice to the respondents stating that the said advertisement was not true and notifying them to withdraw the same with an apology but met with no response and hence filed this suit.

[45] The above facts would seem to suggest that a delay in the settlement of the judgment sum led to the following chain of events, namely:

(a) judgment in default against the appellant for the sum of RM8,658.18 with interest and costs was obtained on 7 March 1994;

(b) the bankruptcy notice was issued on 2 November 1999, ie, more than five years later;

(c) the appellant paid the monies owing directly to MBf Finance Berhad sometime in August 2000, ie, about 10 months later after the issuance of the bankruptcy notice;

(d) a few days after the above payment was made, solicitors for MBf Finance Berhad applied for and obtained leave to serve the bankruptcy notice and the order for substituted service.

[46] The above facts would suggest that solicitors for MBf Finance Berhad were not aware that the judgment sum had been settled as the monies were paid directly to MBf Finance Berhad. Consequently, pursuant to the terms of the court order, solicitors for MBf Finance Berhad requested the first respondent, which obviously were not aware of the above facts, to print the said advertisement in the *Malay Mail*.The first respondent, as the owner of the *Malay Mail* is now faced with this defamation suit.

[47] Can it be said, as purportedly alleged by the appellant, that there is malice of the part of the first respondent when it published the said

advertisement? We find it preposterous to answer this question in the positive. What is malice? According to *Osborn's Concise Law Dictionary* (7th Ed) the word 'malice' means:

> Ill-will or evil motive: personal spite or ill-will is sometimes called actual malice, express malice, or malice in fact. In law an act is malicious if done intentionally without just cause or excuse. So long as a person believes in the truth of what he says and is not reckless, malice cannot be inferred from the fact that his belief is unreasonable, prejudiced or unfair (*Horrocks v Lowe* [1972] 1 WLR 1625). Malice in the law of tort is a constituent of malicious prosecution, defamation, malicious falsehood, and conspiracy. But an act otherwise legal is not made wrongful by an improper motive (*Mayor of Bradford v Pickles* [1895] AC 587).

[48] It cannot be disputed that the said advertisement is a notice issued by or on the authority of the court and hence is privileged pursuant to s 12(1) of the Act unless the appellant can show malice. According to *Osborn's Concise Law Dictionary* (7th Ed), the word 'privilege' means:

> An exceptional or extraordinary right, immunity or exemption belonging to a person in virtue of his office or status ...
>
> A man attacks the reputation of another at his own risk, but a defamatory statement is privileged as follows. (1) A statement is absolutely privileged when no action will lie for it even if it is made with malice (qv), eg, statements made in the course of judicial proceedings. (2) Qualified privilege is where a person is not liable to an action for defamation unless he is guilty of malice, eg, statements made in the course of duty, reports or proceedings, etc.

[49] As to what is malice has also been clearly explained in *Beach v Freeson* [1972] 1 QB 14. In that case the defendant, a Member of Parliament, wrote a letter to the Law Society and an identical one to the Lord Chancellor, saying that he had been specifically requested by a constituent to refer the plaintiffs' solicitors' firm to the Law Society for investigation. He set out the constituent's complaints and stated that contrary to his usual practice he had complied with the request because he had received complaints from other constituents in the past concerning the plaintiffs' firm. In the plaintiffs' action against him for libel, he did not contend that the letter was other than defamatory but that the publication was on an occasion of qualified privilege. The plaintiffs denied that it was so privileged and contended that even if there was qualified privilege, the defendant had been actuated by malice. The court gave judgment for the defendant. The learned judge held that as the defendant had not been actuated by malice, the letter was privileged. In his judgment, Geoffrey Lane J said (at p 26):

> Finally, have the plaintiffs proved that the defendant was actuated by express malice? Malice includes any spite or ill-will directed from the defendant at the plaintiffs. It also includes any indirect motive. That is to say, any intention on the

part of the defendant to use the occasion, not merely for the purpose for which it is a subject of qualified privilege, but for some extraneous purpose of his own not connected with privilege. That is sufficiently demonstrated in *Nevill v Fine Arts and General Insurance Co Ltd* [1895] 2 QB 156, at p 171, per Lopes LJ:

> The effect of the occasion being privileged is to render it incumbent upon the plaintiff to prove malice, that is, to shew some indirect motive not connected with the privilege, so as to take the statement made by the defendant out of the protection afforded by the privileged occasion. This he may do either by extrinsic evidence, by which I mean something outside the statement itself, or by intrinsic evidence, by which I mean something contained in the statement itself.

[50] In the instant appeal, it is our view that when solicitors for MBf Finance Berhad applied for leave for extension of time to serve the bankruptcy notice and for an order for substituted service of the bankruptcy notice, it formed part and parcel of judicial proceedings to which there is absolute privilege. As to what is 'absolute privilege' has been explained by Lopes LJ in *Royal Aquarium and Summer and Winter Garden Society Ltd v Parkinson* [1892] 1 QB 431, the learned judge said (at p 451):

> The authorities establish beyond all question this: that neither party, witness, counsel, jury, nor judge, can be put to answer civilly or criminally for words spoken in office; that no action of libel or slander lies, whether against judges, counsel, witnesses, or parties, for words written or spoken in the course of any proceeding before any court recognised by law, and this though the words written or spoken were written or spoken maliciously, without any justification or excuse, and from personal ill-will and anger against the person defamed. This 'absolute privilege' has been conceded on the grounds of public policy to insure freedom of speech where it is essential that freedom of speech should exist, and with the knowledge that courts of justice are presided over by those who from their high character are not likely to abuse the privilege, and who have the power and ought to have the will to check any abuse of it by those who appear before them.

We are of the view that the position is the same in Malaysia.

[51] In the instant appeal, as discussed earlier, the facts seems to suggest that when solicitors for MBf Finance Berhad made the application for substituted service, they were not aware that the appellant had settled the outstanding sum due under the judgment a few days earlier as payment was made direct to MBf Finance Berhad. The facts would also seem to suggest that when solicitors for MBf Finance Berhad made the request to the first respondent for the publication of the said advertisement, they were still not aware that the judgment sum had been settled as payment was made direct to MBf Finance Berhad.

[52] The following rules of the Bankruptcy Rules 1969 ('the Bankruptcy Rules') deal with bankruptcy notices, namely:

> 91 What Court to issue
>
> (1) ...
>
> (2) A bankruptcy notice shall be issued by the court in which a bankruptcy petition against the debtor may subsequently be filed.
>
> (3) ...
>
> (4) ...
>
> 92 Issue of notice
>
> When applying for the issue of a bankruptcy notice, the creditor shall —
>
> (a) produce to the registrar an office copy of the judgment or order on which the notice is founded;
>
> (b) file the notice, together with a request for issue;
>
> (c) lodge sufficient number of copies of the bankruptcy notice to be sealed and issued for service.
>
> 94 Particulars to be endorsed on notice
>
> (1) Every bankruptcy notice shall be endorsed with —
>
> (a) the name and place of business of the solicitor who is suing out the notice, or if no solicitor is employed, with a memorandum that it is sued out by the creditor in person;
>
> (aa) the name and national registration identity card number of debtor.
>
> (b) ...
>
> (2) ...
>
> 97 Service of notice
>
> A bankruptcy notice shall be served and service thereof shall be proved in the like manner as is by these Rules prescribed for the service of a creditor's petition.
>
> [Rule 109 of the Bankruptcy Rules which relates to 'Service of Creditor's Petition (the side-note reads Personal Service) provides as follows —
>
> A creditor's petition shall be personally served and service shall be effected by an officer of the Court or by the creditor or his solicitor or a person in their employment by delivering a sealed copy of the petition to the debtor.

[53] In relation to substituted service, r 110 of the Bankruptcy Rules provides:

(1) If the Court is satisfied by affidavit or other evidence on oath that prompt personal service cannot be effected because the debtor is keeping out of the way to avoid service of the petition or any other legal process or for any other cause it may order substituted service to be effected in such manner as it thinks fit.

(2) Where any such order has been carried out the petition shall be deemed to have been duly served on the debtor.

[54] Thus, in the instant appeal, arising out of the order of the court on 6 September 2000, solicitors for MBf Finance Berhad requested the first respondent to publish the said advertisement. In relation to this, the appellant aver that the first respondent 'acted intentionally and mala fide when they advertised the libel as their only interest is to make profit out of the said advertisement'. We do not think that under such circumstances, a mere reproduction by the first respondent of a notice of substituted service in the *Malay Mail* upon a payment of a fee or a service charge can be said to be mala fide. The objective of the said advertisement is inform the appellant that bankruptcy proceedings have been instituted against her and that upon its publication in the *Malay Mail*, the effect in law is that the bankruptcy notice have been duly served upon her. As such, we cannot see how it can be argued that there was malice on the part of the first respondent. There is no allegation of ill-will or an indirect motive. There is no allegation that the appellant and the first respondent had ever met; they do not seem to know each other. Neither is there any allegation that she had dealings with the first respondent prior to the publication of the said advertisement. We are of the view that the first respondent has the absolute right to publish the said advertisement. They clearly acted within the law.

[55] The publication of the said advertisement in the *Malay Mail* shall be privileged, unless it is proved to be made with malice, pursuant to s 12 of the Act read together with para 3 of Part I of the Schedule to the Act. A person who requested for the publication of an advertisement would have to pay for that service. What ill-will can be imputed when the first respondent is not a party to the bankruptcy proceedings and clearly would not even know whether the debt or judgment sum has been settled by the appellant. One cannot even impute any knowledge to the first respondent whatsoever even if the application for substituted service was improper. In *Searles v Scarlett* [1892] 2 QB 56 an action for libel was dismissed on the ground that the publication of a mere copy of what is contained in a register of judgments is privileged. The facts of the case are as follows. The plaintiff was a hotel-keeper and the defendant was the secretary of the Ramsgate Trade Protection Association. An extract from the register of county court judgments was published in *The Weekly Journal of the Associated Trade Protection Societies of*

Great Britain and Ireland issued by the Ramsgate and District Trade Protection Association, stating that judgments had been obtained in the county court against the persons named, among whom was the plaintiff. The journal had a considerable circulation among tradesmen in the neighbourhood of Ramsgate. A note was appended to the effect that the statement was taken from the register of county court judgments, but that no distinction was made in the register between actions for debt or damages or properly disputed cases, neither was it known which of the judgments remained unpaid, but it was probable that a large proportion of them had been settled or paid.

[56] The plaintiff brought an action for libel alleging by way of innuendo that the statement meant that a judgment had been obtained against him in the county court, which remained unsatisfied, and that he was insolvent and a person to whom credit ought not to be given. The judgment was in fact satisfied at the time of the publication of the alleged libel. It appeared to have been through some mistake that the judgment was ever entered on the register as the plaintiff had paid the amount earlier. The trial judge decided that the words complained of were not capable of the defamatory meaning alleged. An application for a new trial of the action was made but was dismissed by the Court of Appeal on the ground that the publication of a mere copy of what is contained in a register of judgments, kept in pursuance of an Act of Parliament, and which by law the public are entitled to inspect, is privileged and as there was no evidence of actual malice, the action was not maintainable. In his judgment, Lord Esher MR said (at pp 59–61):

> If such a list of judgments had not been made under any legislative authority, but had been kept by a private person for his own purposes, then it seems to me that there might be no privilege. But the ground upon which the privilege has been put is this. It has been said that these judgments are the judgments of a court of law instituted by the legislature, and it is directed by the law that a register shall be kept of them, which is to be open to public inspection. The Legislature has enacted that people may go and look at the register, obviously not for the purpose of mere curiosity, but that they may act on the information thereby obtained; so that any tradesman who is considering whether he shall give credit to a person may inspect the register and see whether there are judgments against him upon it. The law provides that the register shall be a public document which anybody may consult for this purpose. That being so, the publisher of such a list as this is only doing for the public what they may do for themselves, and is only giving that information to the public and to tradesmen which the Legislature has thought it right they should have. Therefore it is said that the publication of such a list is privileged and an action will not lie for it, unless the privilege has been abused. If the publication has been from an indirect motive, eg, for the purpose of extorting money, or if there were any actual malice, eg, if the publication were to gratify a feeling of revenge, then, no doubt, the privilege would be rebutted; but as long as the publication is bona fide and without actual malice, it is privileged. Of course, if a libel, however malicious, is true, it is not actionable. The doctrine of privilege

assumes that there is a libel and that it is not true. There is clear authority, in my opinion, on the subject. To my mind, this case is governed by *Fleming v Newton* (1 HLC 363). In order that it may be so governed, I do not think it is necessary that the two cases should be exactly the same in their circumstances. I think that in that case the House of Lords laid down as the very foundation of their judgment a principle which will govern this case. That principle was enunciated by Lord Cottenham LC, not, it is true, in an action of libel, but, I think, as a principle which must govern a case of libel. It is, that where there is a register kept by virtue of an Act of Parliament for the purpose of giving information to the public, then, if a person makes a copy of it and publishes it, although he does so for the purpose of warning the public or tradesmen about to give credit, yet, if all that he does is to publish a copy of the register which is intended to be a public document, it is a privileged publication. He said: 'From these references it appears to me clear that the legislature has thought that the public at large ought to be able to have recourse to this register, and of all the public the appellants have the highest interests in the knowledge of its contents. They are engaged in mercantile affairs in which their security and success must greatly depend upon a knowledge of the pecuniary transactions and credit of others. That each of them might go or send to the office and search the register, is not disputed, and that they might communicate to each other what they had found there is equally certain. What they have done is only doing this by a common agent, and giving the information by means of printing. No doubt, if the matter be a libel, this is a publication of it; but the transaction disproves any malice, and shews a legitimate object for the act done'. I think that what he so said was intended to apply even if the action were one for libel. That case has since been treated by every judge who has had to deal with such cases as this as laying down the governing rule in the matter. There is for instance the decision in *Annaly v Trade Auxiliary Co* (26 LR Ir 11, 394) in the Irish Court of Appeal, which is not binding on us no doubt, but which is entitled to the highest respect. That was an action of libel in respect of a publication in *Stubbs's Weekly Gazette*. It came, in the first instance, before the Irish Court of Exchequer when Palles CB, was presiding. He said that the case was governed by the principle laid down by Lord Cottenham in *Fleming v Newton*, with which he entirely agreed. The case then went before the Court of Appeal in Ireland. The first judgment was given by Lord Ashbourne C. He took the reasoning in *Fleming v Newton* and applied it to the case before the court. He said that there was a public officer bound to register all judgments lawfully brought to him in books open to the public, and intended essentially to be public, and that, when the judgment was registered, all the particulars copied into the register were published for all purposes and became public property; and that being so, when a society or person merely published what was contained in the register, for the purpose of giving information to tradesmen, which by law the public were entitled to, the publication was privileged and no action lay, not because the matter might not be libellous, but because it was privileged.

[57] Under the circumstances discussed above in relation to the instant appeal, we are of the view that the said advertisement is absolutely privileged and the learned judge was correct in making the decision that he did. The said advertisement was published on the authority of a court within Malaysia

and r 110 of the Bankruptcy Rules read together with r 97 of the same clearly provides that a bankruptcy notice can be served by way of substituted service.

[58] The other issue for us to determine is whether O 33 r 2 of the Rules is an appropriate procedure to be used in defamation suits. In his submission, counsel for the appellant argued that such a procedure is not suitable in a libel action and for support referred to *Morris & Anor v Sandess Universal Products* [1954] 1 All ER 47. In that case, the Court of Appeal was of the view that the question raised in a libel action was not a proper subject to be raised and disposed of as a preliminary point of law under RSC, O 25 r 2 (which is in pari materia with O 33 r 2 of the Rules). The facts of the case are as follows. The defendant company is a distributor and retailer of carbon papers, inked ribbons and similar articles and had employed each of the plaintiffs as a sales manager each at a weekly salary with commission. On 20 June 1952, each of the plaintiffs agreed orally to determine their respective employments by the defendant company by tendering their resignation and the defendant company accepting the same. Subsequently in a circular letter addressed to their customers, the defendant company stated that they had dismissed the plaintiffs who had now no connection whatsoever with the defendant company. The plaintiffs sued for libel, alleging that the words used by the defendant company meant that the plaintiffs had been guilty of some discreditable conduct, and the defendant company contended that the words complained of were incapable of a defamatory meaning.

[59] Consequently, it was ordered 'that there shall be tried as a preliminary point of law the issue whether the words complained of in the statement of claim have in their ordinary signification any defamatory meaning or are capable of bearing the alleged defamatory meaning other than their ordinary meaning having regard to the facts and matters relied upon herein'. On that issue, tried as a preliminary point of law under RSC O 25 r 2, Lord Goddard CJ decided that the words 'dismissed from our employ' in a letter of the kind in question were capable of a defamatory meaning.

[60] The defendant company's appeal to the Court of Appeal was dismissed. In his judgment, Jenkins LJ said (at p 51):

> ... With the question whether or not they are defamatory, this court at this stage has nothing whatever to do. That will be a question for the jury when the case comes to be tried.
>
> Accordingly, I would dismiss this appeal. I must say that, in my judgment, the procedure under RSC, O 25 r 2, is most unsuitable for the purpose for which it has been used in this case. If recourse is to be had to that rule on the question whether or not words complained of in a libel action are capable of a defamatory meaning, it seems to me that the practice may grow up of splitting libel actions into two stages, the first being concerned with the aspect of the case with which

> we have been occupied today and the second being the trial of the case itself in the event of the defendant's failing to put a summary end to the proceedings on the preliminary issue with which we are now dealing. That appears to me to be a most undesirable practice, and, in my view, a question such as that now raised is not a proper subject for an application under the procedure prescribed by RSC O 25 r 2.

[61] Counsel for the appellant also referred to *Tilling v Whiteman* [1979] 1 All ER 401 where the question posed to the court of first instance as a preliminary point of law was based on hypothetical facts. The dispute was in relation to the Rent Act 1968. The appeal to the Court of Appeal was dismissed and the appellant appealed to House of Lords. In allowing the appeal and remitting the case to the court of first instance for trial, Lord Wilberforce made the following observation on the practice of courts of first instance allowing preliminary points of law to be taken; he said (at p 403):

> Miss Whiteman did not yield up possession as she had agreed, so the owners brought proceedings in the Canterbury County Court for possession and other relief. Pleadings were exchanged, and the case came on for trial in May 1977 with both sides legally represented. The judge took what has turned out to be an unfortunate course. Instead of finding the facts, which should have presented no difficulty and taken little time, he allowed a preliminary point of law to be taken, whether case 10 applies to a case where there are joint owners one only of which requires the house as a residence. *So the case has reached this House on hypothetical facts, the correctness of which remain to be tried*. I, with others of Your Lordships, have often protested against the practice of allowing preliminary points to be taken, since this course frequently adds to the difficulties of courts of appeal and tends to increase the cost and time of legal proceedings. If this practice cannot be confined to cases where the facts are complicated and the legal issue short and easily decided, cases outside this guiding principle should at least be exceptional. (Emphasis added.)

[62] In *Allen v Gulf Oil Refining Ltd* [1981] 1 All ER 353, in an action brought by the plaintiff for nuisance, the court had to deal with a complex preliminary point. The facts are as follows. By the Gulf Oil Refining Act 1965, an oil company ('Gulf Oil') were authorised to construct certain works in connection with an oil refinery they intended to establish at Milford Haven. In 1967 Gulf Oil built a large oil refinery on the land referred to in the Act and which they had compulsorily acquired for the purpose, and constructed various jetties and railways in connection with it. The plaintiff who lived in the near neighbourhood of the refinery brought an action for nuisance. Gulf Oil resisted the claim by a plea of statutory authority. On a preliminary issue the judge ordered that Gulf Oil could rely on the 1965 Act as having authorised the construction and operation of the oil refinery. The plaintiff appealed to the Court of Appeal which reversed the judge's decision. Gulf Oil appealed to the House of Lords. The appeal was allowed. In his opinion, Lord Wilberforce observed as follows (at p 355):

> My Lords, I and others of Your Lordships have protested against the procedure of bringing, except in clear and simple cases, points of law for preliminary decision. The procedure indeed exists and is sometimes useful. In other cases, and this is frequently so where they reach this House, they do not serve the cause of justice. The present is such an example. The question as originally framed was clearly inept. It was recast by Kerr J into an improved form. But both judges in the Court of Appeal (Lord Denning MR and Cumming-Bruce LJ) [1979] 3 All ER 1008, [1980] QB 156) found it either unintelligible or unanswerable; so I believe do some at least of Your Lordships. The fact is that the result of the case must depend on the impact of detailed and complex findings of fact on principles of law which are themselves flexible. There are too many variables to admit of a clear-cut solution in advance.

[63] Counsel for the appellant also referred to *Federal Insurance Co v Nakano Singapore (Pte) Ltd* [1992] 1 SLR 390 where Chan Sek Seong J (at p 394) said:

> Thirdly, we are in full agreement with counsel with respect to the powers of the court under O 33 r 2 of the RSC. That rule expressly provides that the court may order any question or issue arising in a cause or matter, whether of fact or law or partly of fact and partly of law to be tried before at or after the trial of the cause or matter. It would be contrary to the express terms of that rule for a court to hold that it has no power to state a preliminary point even if it involves having to determine some issues of fact in order to determine the point of law. An action may involve many disputes on the facts as well as on the law, some more complex than others. It may be that the determination of a preliminary point in one way may make it unnecessary for other more complex issues of fact or law to be decided, thus resulting in a saving of time and expense of a protracted trial on those issues.

and at p 397 said:

> Taking all the points made by counsel for the appellants, we may state as a general rule that the court will not exercise its power under O 33 r 2 to order a preliminary point of law to be tried, whether or not that point involves the prior determination of factual disputes affecting that point, unless the trial of that issue will result in a substantial saving of time and expenditure in respect of the trial of the action as a whole (including any counterclaim). It is a matter of discretion for the court to exercise in the circumstances of each case, bearing in mind that 'Preliminary points of law too often are treacherous short cuts. Their price can be ... delay, anxiety and expense' (per Lord Scarman in *Tilling v Whiteman* [1979] 2 WLR 401; [1979] 1 All ER 737 (folld, at p 410).

[64] In *Everett v Ribbands* [1952] 1 KB 112, the court was of the view that where a point of law, if decided in one way is going to be decisive of litigation, then advantage should be taken of that facility as provided under the Rules of Court. That case was referred to with approval in *Carl Zeiss Stiftung v Herbert Smith & Co* [1969] 1 Ch 93. The facts of Carl Zeiss Stiftung are as

follows. The plaintiff, a corporate entity carrying on business in East Germany, brought an action in England against another organisation of the same name carrying on business in West Germany, claiming that the West German company had been guilty of passing off and infringing trade marks and, in addition, that all the property and assets of the West German company belonged to the plaintiff. The plaintiff brought a separate action against the defendants, two firms of solicitors acting for the West German company in the main action, claiming that the defendants were liable to pay over all the moneys that they had received from the West German company for fees, costs and disbursements. The trial judge refused to order trial of a preliminary issue on a point of law in the action against the solicitors.

[65] In allowing the appeal the court held that the test whether the trial of a preliminary issue on a point of law should be directed was whether the point of law, if decided in one way, would be decisive of the litigation, and the point of law in the present case would dispose of the claim against the solicitors irrespective of the decision in the main action; accordingly the question of law whether the defendant solicitors would be accountable to the plaintiff in respect of fees, costs or disbursements received by them in good faith in their capacity as solicitors for the defendants in the main action should be tried as a preliminary issue. In delivering the judgment of the court, Lord Denning MR said (at pp 98–99):

> The judge refused to order a preliminary issue. He said that the main action should be fought out to its conclusion before the trial judge; and then this second action against the solicitors should be tried before the same judge.
>
> I am afraid that I cannot agree with the judge's decision. These solicitors ought to know where they stand. They should be able to conduct the litigation without having a sword suspended over their heads. It is not a hypothetical issue. It is a practical issue of urgency. It is very desirable that it should be decided as soon as possible before many further costs are incurred.
>
> I know that it has been said on one or two occasions that a preliminary issue should be ordered only when, whichever way it is decided, it is conclusive of the matter. That was said by Lord Evershed MR in *Windsor Refrigator Co Ltd v Branch Nominees Ltd* [1961] Ch 88; [1961] Ch 375, 396; [1961] 2 WLR 196; [1961] 1 All ER 277 (CA); and Harman LJ in *Yeoman Credit Ltd v Latter* [1961] 1 WLR 828, at p 835; [1961] 2 All ER 294 (CA). I do think that is correct.
>
> The true rule was stated by Romer LJ in *Everett v Ribbands* [1952] 1 KB 112; [1951] 2 All ER 818; [1952] 2 QB 206; [1952] 1 All ER 823):
>
> > Where you have a point of law which, if decided in one way, is going to be decisive of litigation, then advantage ought to be taken of the facilities afforded by the Rules of Court to have it disposed of at the close of the pleadings, or very shortly after the close of pleadings.

I have always understood such to be the practice. I quite agree that, in many cases, the facts and law are so mixed up that it is very undesirable to have a preliminary issue. I always like to know the facts before deciding the law; but this is an exceptional case. The solicitors have received in good faith moneys for the defence of this action. They ought to know at once whether they safely go on receiving them. If the issue of law is decided in their favour, it will dispose of the claim against them, irrespective of the main action. I would order a preliminary issue to be tried.

[66] In *Keays v Murdoch Magazines (UK) Ltd & Anor* [1991] 4 All ER 491 the Court of Appeal held that the court has jurisdiction in defamation cases to decide on a preliminary point of law and that on the facts of the case, the trial of the preliminary issue was appropriate and to that extent the appeal was allowed. In its judgment, the Court of Appeal considered *Morris v Sandess Universal Products*. The facts of *Keays* are as follows. The defendants, the publishers and the editor of a magazine, published in the October 1989 issue under the heading 'Laughing all the way to the bonk' an article describing the activities of a number of women who had had affairs with prominent men and who had then received or in one case refused substantial sums from newspapers in return for accounts of their sexual relationships with the men concerned. Certain paragraphs of the article referred specifically to the plaintiff and her relationship with a Cabinet Minister, who was the father of her child. The article stated, inter alia, that there was one aspect of the plaintiff's story which put her firmly in the company of the other women referred to in the article, namely the man involved was famous and had a reputation to protect, the article continued: 'It's a reminder that Kiss 'n' Tell is a thoroughly British pastime'.

[67] The plaintiff brought an action against the defendants claiming damages for libel, alleging that the words complained of in the article in their natural and ordinary meaning meant that the plaintiff had the affair with the Cabinet Minister with the intention of later publishing her revelations in a 'Kiss 'n' Tell book' which placed her in the same position as other women who had affairs with famous men in order to make money by selling their explicit memoirs to the tabloid press.

[68] The defendants applied to have the question whether the words complained of by the plaintiff were capable of bearing the meaning pleaded in the statement of claim tried as a preliminary issue. Both the master and the judge dismissed the application on the ground that the court had no jurisdiction in a libel action to order trial of a preliminary issue on the defamatory meaning. The defendants appealed to the Court of Appeal. The parties asked that, if the court held that there was jurisdiction to order the

trial of the preliminary issue sought, it should in the circumstances itself decide that issue. In delivering the judgment of the court, Neal LJ (at pp 497–498) said:

> It is also relevant to consider the alternative to the trial of a preliminary issue. At one time it seems to have been the practice to seek a ruling from the judge on the question whether the words were capable of the alleged defamatory meaning at the conclusion of the case for the plaintiff or even at a later stage of the trial. We were told that in some recent cases the defendant has invited the judge to make such a ruling at the outset of the hearing as a preliminary point. Whichever practice is followed it means that the parties will have prepared for trial and that very substantial additional expense will have been incurred.
>
> It has been suggested that sufficient protection is given to defendants by the existence of the right to apply to strike out a pleaded meaning which is considered extravagant and unfit to be considered by the jury. But, according to the law as clearly stated by Lord Guest and Lord Pearson in *Morgan v Odhams Press Ltd* [1971] 2 All ER 1156 at pp 1173, 1182; [1971] 1 WLR 1239 at pp 1257, 1268, on the hearing of an application to strike out the question to be determined is not whether the words are capable of bearing a defamatory meaning but whether they are arguably capable of bearing such meaning. It is, I believe, the experience of practitioners that it is rare for an application of this nature to succeed.
>
> I am satisfied that the jurisdiction exists to order the trial of a preliminary issue to determine whether the words complained of are capable of bearing a particular meaning and that this jurisdiction should be exercised in appropriate cases where it is apparent to the court that a saving of costs would be achieved. If such an application by a defendant succeeds in full the action will be at an end, unless the plaintiff seeks and is granted an amendment to plead some alternative meaning. Even if the application is only partially successful, a saving of costs may well be effected by limiting discovery and the preparation of evidence to that meaning or those meanings which the court has ruled the words are capable of bearing. Furthermore, I see no reason in principle why, if the defendant seeks to put forward a meaning which the plaintiff seeks to challenge, the court should not, in an appropriate case, rule on the defendant's meaning at a preliminary stage. I should add, however, that I anticipate that there will be many cases where the trial of a preliminary issue will be wholly unnecessary and where it would itself add to the expense of the proceedings and would occasion unjustified delay.

[69] It is our view that the instant appeal is clearly a case where the determination of the question posed would substantially dispose of the whole action. The trial of the preliminary issue has resulted in a substantial saving of time and expenditure in respect of the trial of the action as a whole. We cannot see why advantage should not be taken of such a facility as provided under O 33 r 2 of the Rules. Section 12(1) of the Act provides a statutory defence for the first respondent and having shown that the publication of the said advertisement, issued on the authority of the High Court, is in accordance with written law, and the appellant having failed to raise an arguable case that the first respondent was actuated by malice in publishing

A the said advertisement, we cannot see what further light would be thrown if the matter goes for trial. The preliminary point raised was not a complex issue which require the matter to go for full trial. It was clearly not based on hypothetical facts. It dealt with a single point of law which, after having been decided in favour of the first respondent, was decisive and has disposed of the
B entire litigation. The appellant failed to show any spite or ill-will directed from the first respondent to her goodself or even any indirect motive. The publication of the said advertisement was absolutely privileged and as such, we are of the view that the learned judge was correct in dismissing the suit as the determination of the question posed in the affirmative has substantially
C dispose of the whole action.

[70] We cannot find anything wrong with the decision of the learned judge and as such, for the reasons we have given, we unanimously dismiss the third appeal with costs and order that the deposit be remitted to the first
D respondent to the account of taxed costs.

Appeals dismissed with costs.

E Reported by K Nesan

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